

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Appeal from Order No.729 of 2007
in
Notice of Motion No.356 of 2007
in
S.C.Suit No.415 of 2007.

Shri Janardhan @ Baccha
S/o.Mangalprasad Singh ..Appellant

versus

Smt.Kusum Mangalprasad Singh
@ Sharma ..Respondent.

Mr. Anil C. Singh i/b. Sanjeev Singh for the
Appellant

Mr.D.R.Vishwakarma for the Respondent

Coram : S.R.Sathe, J.
Dated : 24th Sept., 2007

JUDGMENT

1. This is a dispute between mother and son. Appellant, the original defendant (son) in S.C.Suit No.415 of 2007 has preferred this appeal against the Order passed by the City Civil Court, Bombay in Notice of Motion No.356 of 2007 whereby the defendant was directed to vacate and hand over the peaceful possession of the suit premises to his mother, the plaintiff pendente lite and also directed that having delivered the possession the defendant and his family members should not obstruct the plaintiff's possession till the disposal of the

suit. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendant.

2. Brief facts giving rise to this appeal are as under:

. The flat No.3 situated on the Ground floor of Krishna Kunj Building, Golibar, 7th Road, Santa Cruz, was in possession of the husband of the plaintiff as a tenant and plaintiff and her children were residing in the said flat since prior to 1994. The plaintiff has three sons and two daughters. Both the daughters are residing with their respective husband. The plaintiff and her husband were conducting business of selling milk at the place near from the suit flat. It was a stable. Sometime in 2007 the developer by name M/s. Adarsh Developer approached plaintiff for development of the said land of stable. The sons of the plaintiff negotiated the terms and conditions and entered into an agreement with the developer and promised to pay sum of Rs.6,00,000/- to each son and also to provide accommodation in the same locality admeasuring about 550 sq.ft flat and shop of 300 sq.ft to each son.

The plaintiff was also promised by the developer to give flat and shop of same size. According to plaintiff the defendant who is her son was residing at some other place and not in the suit flat. However, the name of the defendant was included in the ration card of the plaintiff which was on the address of the suit flat. It is her case that on 8.11.2005 defendant came to the suit premises and started throwing the plaintiffs articles out of the house. Hence, plaintiff's youngest son contacted the police and due to the intervention of police further action of the defendant was stopped. Then again on 9.11.2005 the defendant tried to dispossess plaintiff from the suit flat. Hence, she filed Short Cause Suit No.4802 of 2005 and prayed for permanent injunction restraining defendant from dispossessing her from the suit flat. The Court was pleased to pass an order directing the parties to maintain status quo. It is the case of plaintiff that inspite of the said order the defendant never allowed her to reside in the suit premises peacefully. The wife and children of the defendant used to harass her and dominate her. As a result of this and apprehending danger from the defendant, the plaintiff started residing with her younger son

Avdesh MangalPrasad Singh who was residing at B-57, Sai Prasad Building. Even thereafter she requested the defendant to allow her to reside in the suit premises, but the defendant did not listen to her. Hence plaintiff filed the present suit against her son i.e. the defendant and prayed for possession of the suit premises.

3. The plaintiff filed notice of motion and prayed that Court Receiver be appointed to take over the possession of the suit premises and hand over the possession to the plaintiff as Receiver's Agent on the terms and conditions decided by the Court and pending hearing and disposal of the suit the defendant be restrained from creating third party interest in the suit flat.

4. The defendant No.1 appeared and opposed the notice of motion by filing affidavit in reply. He contended that the suit premises was taken on rental basis by his father but after the death of his father all the heirs of his father mutually decided to have the rent receipt in the name of plaintiff, but that was only for the sake of convenience. He also contended that even during the lifetime of his

father he, his other brothers and sisters and mother were residing together in the suit flat. He also contended that in the year 1993 when there was communal riot, under the circumstances, they were forced to shift to the other premises situated by the side of the stable. He, however, contended that the plaintiff was not at all in exclusive possession of the suit flat as alleged. He also denied plaintiff's allegation that he acted high handedly and drove the plaintiff out of the house. He, therefore, contended that plaintiff is not entitled for the relief of appointment of Receiver.

5. After hearing the arguments of both the learned advocates, the learned Trial Judge came to the conclusion that though after the death of the husband of plaintiff, the heirs and legal representatives who were residing with the plaintiff's husband are entitled to succeed to the tenancy, when all the heirs unanimously agreed that the tenancy shall be in the name of plaintiff, it should be held that the plaintiff has got unbridle right vis-a-vis the other heirs and legal representatives of the deceased tenant in so far as the tenancy is concerned. According to the learned

trial Judge, the rights of the other legal representatives are weaker than the rights of the plaintiff. Considering the fact that the relation between the plaintiff and her son i.e. the defendant are not good, he thought it fit to direct the defendant to vacate and hand over the possession of the suit premises to the plaintiff during the pendency of the suit.

6. Being aggrieved by the said order, the defendant has filed the present appeal. In this appeal before me Shri Anand Singh, learned Advocate for the Appellant Original Defendant has urged two points. Firstly, he submitted that there is abundant evidence on record to show that the present defendant was in occupation of the suit premises right from the time when his father was alive. Merely because the rent receipt is standing in the name of plaintiff that does not mean that the defendant who had also inherited the tenancy right can be evicted. Secondly, he canvassed before me that by granting mandatory injunction directing the defendant to vacate the suit premises and hand over the possession to plaintiff, the learned trial Judge has in fact decreed the suit. He, therefore,

submitted that the order passed by the learned trial Judge is not legal and correct. According to him the plaintiff had failed to prove her exclusive possession and as such also direction for mandatory injunction should not have been given. He, therefore, submitted that the appeal be allowed and the order passed by the learned trial judge be set aside. As against this, the learned advocate for the respondent plaintiff supported the order passed by the learned trial Judge.

7. It is not in dispute that the suit flat was initially taken on lease by the husband of the plaintiff. Admittedly, plaintiff and his children including defendant were all residing with the original tenant in the tenanted premises i.e. the suit premises. Admittedly, the original tenant died intestate leaving behind his wife i.e. plaintiff and children including the defendant. The bare perusal of the ration card is sufficient to show that the defendant was residing in the said flat along with plaintiff. So, it is very clear that as per the provisions of Section 5(11)(c) of the Bombay Rent Hotel & Lodging House Rates Control Act, 1947, the plaintiff as well as the defendant have acquired the

tenancy rights. It is also clear from the material on record that it is only by way of interim arrangement or convenience the other heirs of the original tenant agreed that the rent receipt should be in the name of the plaintiff. However, that does not mean that plaintiff has got a right to evict the other heirs from the said premises. The learned advocate for the defendant submitted that the defendant has in fact become a joint tenant or tenant in common and when it is clear that he was in possession of the suit flat on the date of the suit, there was no reason for the trial court to pass such order which ultimately amounts to grant of decree in favour of plaintiff. According to him, when the plaintiff has filed the present suit for possession of the suit property from the defendant, it means that the plaintiff has also admitted that presently the defendant is in possession. So, under such circumstances, the application for temporary injunction ought to have been dismissed. In order to substantiate the proposition that the defendant has also acquired tenancy right, the learned advocate for the defendant has placed reliance on a case **Ashok Chintaman Jukar vs. Kishore Pandurang Mantri 2001(4) Bombay Cases Reporter 31** wherein the

Apex Court has observed :

"This Court in the case of (H.C.Pandey v.G.C.Paul) A.I.R. 1989 S.C.1470 taking note of settled position that on the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant, held that it is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereafter and that is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants."

. From the above observation it is very clear that in the instant case the defendant has also acquired tenancy right in respect of the suit flat. Merely because the rent receipt is standing in the name of the plaintiff, that would certainly not give the right to the plaintiff to evict the defendant.

8. In the instant case the relief granted by the learned trial Judge is in the nature of mandatory injunction. It is needless to say that while granting any relief in the nature of mandatory injunction the court has to be very slow. It should be granted in very rare cases. If the relief which is to be granted is amounting to evicting the person from the property which is in his possession then it

is also necessary to take into consideration the time since when he is in possession and nature of his possession. If there is sufficient evidence on record to show that the defendant who is now in possession of the suit property was not at all in possession of the suit property and has acquired the possession unlawfully, high handedly, very recently or rather just before the filing of the suit then in such exceptional circumstances the order with regard to evicting such person and putting the person who was already in possession but unlawfully dispossessed can be passed even at the interim stage. However, in the instant case the defendant is already in possession of the suit premises for long time. This is not a case where the possession of the defendant can be regarded as that of a trespasser. So, considering these facts and circumstances, I have no hesitation to hold that the order passed by the learned trial Judge directing the defendant to vacate the suit premises and handover the possession to plaintiff during the pendency of the suit is not legal and correct. The plaintiff has certainly not made out a prima facie case for granting temporary injunction as prayed.

9. Having regard to the peculiar facts of the case and considering the balance of convenience, it is necessary to pass such order which would protect the interest of both the parties and also preserve the property till the disposal of the suit. Hence I pass the following order:

ORDER

1. The appeal is partly allowed.
2. The Order passed by the learned Judge, City Civil Court, Bombay in Notice of Motion No.356 of 2007 in S.C.Suit No.415 of 2007 on 29.6.2007 is set aside.
3. The Notice of Motion No.356 of 2007 is partly allowed. The Court Receiver, High Court, Bombay is directed to take formal possession of the suit flat from the defendant and appoint the Defendant as Receiver's Agent and permit him to continue in the possession of the suit flat on usual terms and conditions. If the plaintiff desires, she be also put in joint possession of the suit flat along with defendant till disposal of the suit.

4. If plaintiff is accordingly put in joint possession then both the parties to the suit should not cause any inconvenience and nuisance to the other party in having joint possession and enjoyment of the suit property till the disposal of the suit.

5. Both the parties shall not create any third party interest in any manner in respect of the suit property, till the disposal of the suit.

6. Under the circumstances of the case, parties to bear their own costs of this appeal.

. The trial court to dispose of the suit according to law on merits as expeditiously as possible and in any even within six months from today.

(S.R.Sathe, J.)